No. 88-1400

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, et al.,
Petitioners,

VS.

ALCAN ALUMINIUM LIMITED and IMPERIAL CHEMICAL INDUSTRIES PLC,
Respondents.

REPLY BRIEF OF PETITIONERS

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Introductory Statement

Respondents' arguments against the granting of the Board's petition for writ of certiorari are basically contradictory. However, the two opposition briefs (hereinafter "Alcan Op." and "Imperial Op.") are basically consistent in one respect. *Neither respondent has made any effort to defend the Court of Appeals' specific holding with respect to standing*—i.e., the holding that respondents suffer direct and independent injuries because California's method of taxation burdens their decisions to conduct foreign commerce through American subsidiaries. Alcan's sole comment is that the Court of Appeals, in holding that the two parent companies have standing, "necessarily had to define for itself the nature of the foreign commerce burden." Alcan Op., at 10. Imperial takes a more drastic approach, its sole comment being that the Court of Appeals' specific finding of independent injury is based on "naked assertions [of fact] that must be resolved by a trial court." Imperial Op., at 13. Thus, while content with the end result of the decision, neither party has supported its essential rationale, the only thing which accounts for the Seventh Circuit's

departure from decisions in previous cases which have ruled that requisite standing is lacking.

REPLY TO IMPERIAL OPPOSITION

The thrust of Imperial's opposition to the Board's petition is that review of the Court of Appeals' decision on the standing issue would be "premature" at this point because that court has not actually decided the standing issue in Imperial's favor. In other words, with astonishing modesty, Imperial has failed to recognize its victory below; it has failed to recognize that the Court of Appeals has decided that Imperial *does* have the requisite standing to challenge the tax assessments issued against its domestic subsidiary. The decision of the Court of Appeals simply cannot be read any other way. Indeed, in the very first paragraph of its lengthy opinion, the court unequivocably states: "We find that Alcan and Imperial have incurred injuries that are sufficiently direct and independent of the injuries incurred by their subsidiaries to confer standing." App., at A-2.

According to Imperial, however, after some four years of litigation, the parties are virtually right back where they started from. In its view, the standing issue is still open to debate in the lower courts because thus far there have been no findings of fact which support Imperial's claim of independent injury. It says, for example, that the controversy over standing "cannot now be resolved other than by a comprehensive review of the record and a determination whether, on that record, Imperial has proven independent injuries." Imperial Op., at 12. With one exception, the asserted necessity for further factual development is the theme of all of the arguments raised by Imperial in its opposition to the petition.[1] These arguments are briefly discussed below.

[1] The one exception is Imperial's argument regarding the Tax Injunction Act. Imperial dismisses the Act as "not an issue" in the case, Imperial Op., at 10, apparently on the basis that Imperial has no direct remedies in the state courts. It has not responded to the Board's argument that Imperial effectively has state remedies to pursue since, as the sole stockholder of its domestic subsidiary, it has full control over pursuit of the state remedies available to the actual taxpayer. Imperial also has offered no response to the Board's argument that, in any event, such a suit by a sole stockholder should be precluded under the principles of comity underlying the Tax Injuction Act.

1. *Contrary to Imperial's assertion, its standing does not depend on the resolution of any factual issue.* Imperial characterizes the decision of the Court of Appeals as "interlocutory" and asserts that the Board's petition should be denied because "certiorari . . . to review an interlocutory order is granted only when there is some compelling principle of law that needs to be clarified *without regard to findings of fact.*" Imperial Op., at 5 (emphasis in original). The argument is fallacious for two reasons.

First, the judgment of the Court of Appeals is "interlocutory" in the sense that it does not reach the merits of the constitutional claims that Imperial wishes to adjudicate. The Court has determined, however, that Imperial has standing to litigate those claims. There is, of course, precedent for the Board's position that a grant of certiorari is entirely appropriate in such a situation. For example, one of the leading authorities on standing, *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), involved two cases (consolidated on appeal) that were in exactly the same procedural posture as the cases at hand. The District Court, as in the present cases, had ruled on motions for summary judgment that plaintiffs lacked standing to sue. 441 U.S., at 95-97. On appeal, the Seventh Circuit, as in the present cases, reversed the judgments of the District Court and remanded for further proceedings. *Id.*, at 98. Plaintiffs then sought review in this Court, which granted certiorari "to resolve the conflict between the decision of the Court of Appeals in this case and that of the Ninth Circuit in [*TOPIC v. Circle Realty*, 532 F. 2d 1273 (9th Cir. 1976)], and to consider the important questions of standing raised under Title VIII of the Civil Rights Act of 1968." *Id.*, at 98-99. Thus, it is clear that in *Gladstone* this Court did not consider the lower court's decision on standing to be of such an "interlocutory" nature as to preclude the grant of certiorari.

Imperial's argument that the Board seeks a "premature" review of the standing decision in the present matter is also fallacious for another reason: there are no issues of fact pertaining to Imperial's standing which need to be resolved. As previously pointed out, the parties have *stipulated* to the salient facts. Imperial nevertheless contends that factual issues remain because "[t]he district court's

dismissal of the two related cases below and the court of appeals [sic] reversal and remand were made on the pleadings without consideration of the extensive factual records that had been stipulated." Imperial Op., at 1. There is absolutely no foundation for this contention, other than the fact that neither opinion goes so far as to recite any of the stipulations. Furthermore, the Court of Appeals itself evidently believed that it had all of the facts necessary to determine that Imperial *does* have standing.

This brings up another point which cannot go unmentioned. In both the Court of Appeals and in this Court, Imperial has asserted that the Board has vigorously opposed any consideration of the facts of record insofar as they may relate to the standing issue. See, e.g., Imperial Op., at 13. In truth, however, the Board has never urged—either in connection with its cross-motion for summary judgment in the District Court, or in its brief filed with the Court of Appeals, or in its petition for writ of certiorari filed with this Court—that the stipulated facts should be disregarded. Rather, the Board has consistently taken the position that even the stipulated facts do not support the claim that Alcan and Imperial suffer injuries independent and distinct from those of their domestic subsidiaries. Particularly relevant are the stipulations in both cases that (1) all taxes are or will be assessed against the domestic subsidiaries, and (2) all informational requests have been directed only to the domestic subsidiaries. See Alcan Stip., ¶ 52; Imperial Stip., ¶ 27.[2]

2. *Contrary to Imperial's assertion, there is a clear conflict among the circuits.* Three previous cases in the Ninth and Second Circuits have considered the standing of a foreign parent to litigate the tax liability of a domestic subsidiary: *Shell Petroleum, N.V. v. Graves*, 709 F. 2d 593 (9th Cir. 1983), cert. den., 464 U.S. 1012 (1983); *EMI Ltd. v. Bennett*, 738 F. 2d 994 (9th

[2] Imperial also asserts that in the District Court "the Board found it necessary to dispute both facts and inferences to be drawn from those facts in their response to Imperial's summary statement of facts." Imperial Op., at 12. As indicated in App. 3 to Imperial's brief in opposition, the Board merely (1) questioned the propriety of Imperial's unilateral "Summary of Statement of Stipulated Facts," and (2) objected to Imperial's paraphrasing of certain stipulated facts and to its reference to alleged facts not appearing in the record.

Cir. 1984), cert. den., 469 U.S. 1073 (1984); and *Alcan Aluminum Ltd. v. Franchise Tax Board*, 558 F. Supp. 624 (S.D.N.Y. 1983), aff'd mem., 742 F. 2d 1430 (2d Cir. 1983), cert. den., 464 U.S. 1041 (1984). Each case decided the standing issue against the foreign parent, and in each case the foreign parent unsuccessfully sought review by this Court.

Imperial suggests (in line with the dominant theme of its opposition to the Board's petition) that certiorari was denied in those cases because none of them "had complete factual records." Imperial Op., at 6. With curious logic, Imperial concludes that, similarly, certiorari should be denied in the present matter because there *is* an extensive factual record. Imperial Op., at 7 ("The limited facts recited in the three cited decisions compared with the allegations, to say nothing of the extensive record, in the instant case demonstrate why certiorari is no more appropriate in the instant case than it was in these precedents"). But, aside from its strange logic, Imperial plainly has overlooked the fact that in all of the previous cases review was sought of orders dismissing the foreign parents' actions. Since none of the foreign parents had the opportunity to develop more complete factual records after denial of certiorari, it hardly makes sense to surmise that certiorari was denied pending the development of more complete factual records.

Imperial also errs in asserting that the allegations in the present matter are substantially different from, and more extensive than, the allegations of injury in the three previous cases. Particularly difficult to swallow is Imperial's assessment of the *Shell* case, which the other two cases followed. Imperial states that "Whether the plaintiff in *Shell* alleged an independent injury is not entirely clear." Imperial Op., at 7. The Board finds this purported ignorance of what transpired in *Shell* to be impossible to accept, given the fact that one of Imperial's counsel in the present case was also one of the counsel in the *Shell* matter. Presumably, therefore, Imperial is well aware not only of the allegations made in *Shell*, but of the factual record that was before the court.

Be that as it may, reference to the *Shell* file (U.S. Dist. Ct., N.D. Cal., No. C-81-4302-MHP) would disclose that the complaint in *Shell* was 45 pages long, containing 97 paragraphs in all. Needless to say, it did not take 97 paragraphs for Shell to express

only a general dissatisfaction with California's method of taxation, as Imperial suggests. See Imperial Op., at 7, n. 25. Moreover, while it is true that the standing issue in *Shell* was raised by a motion to dismiss, the court also had before it a motion for summary judgment filed by Shell that was supported by affidavits and exhibits numbering hundreds of pages. In short, the standing issue in *Shell* was not decided in a factual vacuum.

Imperial also says that the Court of Appeals' opinion in *Shell* did not discuss "the costs of compliance; actual or threatened double taxation; the effect the method of tax might have on the parent company's foreign commerce with the United States; nor the federal government's position on the issue presented." Imperial Op., at 7. The federal government's position on the merits of Imperial's constitutional claims has no bearing on its standing to litigate those claims, and while the federal government filed a brief on the merits in the District Court it refrained from filing a brief in the Court of Appeals in support of Imperial's position on standing. Furthermore, as Imperial should be fully aware, the other matters mentioned by it (costs of compliance, double taxation, etc.) were all argued in *Shell*. See, e.g., Petition for Writ of Certiorari, *Shell Petroleum, N.V. v. Franchetti, et al.*, Case No. 83-586, at 9-10, 20-24.

3. *Contrary to Imperial's assertion, the Board's attack on the Court of Appeals' finding of independent injury is not an attempt to argue the merits of the controversy.* Imperial states that this case "is not . . . appropriately developed for this Court to make the necessary judgments on the important questions of foreign relations, foreign commerce, and foreign prerogatives left undecided in *Container Corp.*" Imperial Op., at 12. The Board, of course, agrees. Imperial goes on to assert, however, that the Board's attack on the Court of Appeal's finding of an independent injury sufficient for standing purposes is an attempt by the Board to present "the merits of [its] case. . . . " *Ibid.*[3] This is obviously

[3] In the same section of its brief, Imperial criticizes the Board's use of a syllogism to explain the logic of the Court of Appeals' finding of an independent injury, stating in particular that the minor premise quotes the Court of Appeals out of context. Significantly, however, Imperial does not claim that the syllogism inaccurately portrays the Court of Appeals' reasoning.

incorrect. The Board's argument dealing with the independent injury envisioned by the Court of Appeals is directed solely to the standing issue—an issue which *is* ripe for review.

Imperial's final argument is that the Board wishes to have it both ways: for standing purposes, it has "declare[d] that Imperial is *merely* a stockholder having only a remote interest in the business of its subsidiary," Imperial Op., at 14-15 (emphasis in original); for substantive purposes, on the other hand, the Board not only imposes burdens on Imperial which are "the burdens imposed on a taxpayer," but "treat[s] *all* corporations within a unitary business as one taxpayer." *Id.*, at 14 (emphasis in original). Responding to the various elements of this argument in sequence, the Board has never asserted that standing should be denied because Imperial is a "mere" shareholder; rather, its consistent position has been that Imperial is affected only in its capacity as a shareholder since any injuries to it are the indirect result of the taxes levied against its subsidiary. Also incorrect is the assertion that the Board has imposed burdens on Imperial that are typical of the burdens imposed on a taxpayer; as has been repeatedly emphasized, the Board has made no demands on Imperial whatsoever. Finally, Imperial errs in stating that "The Board in practice—except when it comes to standing—treat[s] *all* corporations within the unitary group as one taxpayer." Imperial Op., at 14. As recognized in the administrative opinion cited by Imperial, see Imperial Op., at A-4, the term "taxpayer" as used in the California tax law is "multifaceted." For example, that opinion notes that while some of the statutes applying the unitary formula use the term "taxpayer" to refer to the unitary business as a whole, others use that term to refer only to the specific corporate entity subject to the California tax. In the standing context, it only makes sense to apply the general definition of "taxpayer" provided by section 23037 of the California Revenue and Taxation Code: " '[t]axpayer' means any person or bank subject to the tax . . . ." Section 23151 of the California Revenue and Taxation Code imposes the tax only upon the "corporation doing business within the limits of" California.

REPLY TO ALCAN OPPOSITION

The thrust of Alcan's opposition to the Board's petition, in contrast to the opposition presented by Imperial, is that the Court

of Appeals' decision has clearly settled the standing issue in its favor and there should be no further delay in the consideration of the merits of the controversy. In this connection, it takes the federal judiciary to task, stating that "The use by the Courts of the doctrines of abstention, ripeness and standing has long been recognized as mechanisms [sic] of delay." Alcan Op., at 5. This is something like the pot calling the kettle black. The wholly owned subsidiary of Alcan filed its first suit for refund against the Board some 12 years ago—in the early part of 1977. Alcan Stip., ¶ 36, Exh. XIX-1. Instead of having the taxpayer subsidiary pursue that suit for refund, Alcan has spent its time and effort going from one state to another in hopes of finding a receptive federal forum.[4] It is particularly inappropriate under these circumstances for Alcan to complain of delay in the resolution of the constitutional issues involved; these issues could have been litigated in state court proceedings long ago. It is Alcan's own persistence in seeking a federal forum that actually accounts for much of the delay that Alcan finds so objectionable.

Alcan insists, however, that the constitutional issues could not be resolved in the state courts. In its view, if Alcan does not have standing to challenge California's method of taxation as applied to a domestic company with a foreign parent, no one, including its domestic subsidiary, has the standing to do so. It reasons:

> "Alcan operates exclusively in foreign commerce. Its U.S. subsidiary does not operate in foreign commerce. If [California's method of taxation] results in impermissible foreign commerce burdens, those burdens must fall directly and exclusively on Alcan." Alcan Op., at 10.

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[4] Alcan says: "As incredible as it may seem, Alcan started its effort to obtain judicial resolution of *this case* in 1981. We are rapidly approaching the ten-year anniversary of the instigation of *this litigation!*" Alcan Op., at 6 (emphasis added). The case filed in 1981 was the case in the Second Circuit which was dismissed for lack of standing, *Alcan Aluminum Ltd. v. Franchise Tax Board*, 558 F. Supp. 624 (S.D.N.Y. 1983), aff'd mem., 742 F 2d 1430 (2d Cir. 1983), cert. den., 464 U.S. 1041 (1984) (*Alcan I*). The Board could not, if it tried, present a stronger argument for collateral estoppel than Alcan's own admission that the suit filed in Illinois seeks the same relief as the earlier suit filed in New York.

This reasoning was rejected by the Seventh Circuit, see App., at A-4, n. 4, and similar reasoning was rejected by the District Court in *Alcan I*. See 558 F. Supp., at 628. It is illogical on its face. The California method of taxation either does or does not interfere with Congress' power to regulate foreign commerce. If it does interfere with the congressional power, and thus violates the Foreign Commerce Clause, then obviously the corporate taxpayer which is required to pay the invalid tax has standing to complain about it.

Only two other points raised in Alcan's brief merit comment. In the opening pages, Alcan asserts that the issue involving the applicability of the Tax Injunction Act was not appealed by the Board to the Seventh Circuit, "and therefore that issue is not justiciable here." Alcan Op., at 1. The Board did not "appeal" the issue to the Seventh Circuit because it prevailed in the District Court, where the cases were dismissed solely on standing grounds. The Board nevertheless argued in the Court of Appeals that a decision in favor of standing would invite wholesale avoidance of the Tax Injunction Act. Under these circumstances, the Court of Appeals felt compelled to consider the Act's implications. In any event, it is well settled that the Act limits the jurisdiction of the district courts, *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522 (1981), and that a challenge to jurisdiction may be made at any stage of the proceedings. *Sipe v. Amerada Hess Corp.*, 689 F.2d 396, 401 (3d Cir. 1982), citing *Insurance Corp. v. Companie des Bauxites*, 456 U.S. 694, 702 (1982).

Alcan finally claims that "the issues that Petitioner seeks to raise have little or no significance beyond the specific facts of this case." Alcan Op., at 12. That, of course, is boilerplate language typically used to discourage the grant of certiorari. In reality, as indicated by the concerns expressed by the numerous states that have joined in an amicus brief supporting California's petition, the decision of the Court of Appeals has broad significance in the area of state tax administration. The decision has held that parent companies have standing in federal court to challenge state taxes levied against their subsidiaries when the imposition of such taxes is dependent upon the form in which they have chosen to do business. There is no apparent reason why this announced rule would be applicable only to foreign parents, or why it would not be applicable to state tax issues which do not involve the unitary

business/formula apportionment method of accounting. The decision also holds that the sole stockholder of a corporation is not barred by the Tax Injunction Act from bringing a federal action to challenge state taxes levied against that corporation, even though, as the sole corporate stockholder, it is perfectly capable of pursuing its objections to the taxes through the state remedies afforded the corporation. Both of these issues—the issue of standing and the issue involving the applicability of the Tax Injunction Act—are weighty concerns which warrant this Court's attention.

CONCLUSION

For the reasons set forth above and in the Board's petition, it is submitted that the petition for a writ of certiorari should be granted.

March 29, 1989

Respectfully submitted,

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